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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HERBERT GOETTSCH,

Plaintiff and Appellant,

v.

EL CAPITAN STADIUM ASSOCIATION
INC.,

Defendant and Respondent.

D047921

(Super. Ct. No. GIE020037)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie Sturgeon, Judge. Reversed.

I.

INTRODUCTION

Herbert Goettsch was standing outside a chain link fence that enclosed a warm up area for horses that were performing in a rodeo produced by El Capitan Stadium Association, Inc. (El Capitan). A horse was standing on the inside of the fence, tied to the fence with a rope. As Goettsch stood on the outside of the fence watching the rodeo,

he placed both of his hands on the chain link fence. Goettsch's hands became entangled in the rope as the horse pulled away from the fence. Four of Goettsch's fingers were severed in the incident.

Goettsch filed a two-count complaint against El Capitan in which he alleged negligence and premises liability. El Capitan moved for summary judgment on the ground that Goettsch's claims were barred by the doctrine of primary assumption of risk, and also on the ground that Goettsch would not be able to establish the threshold element of duty as to either of his claims because the horse presented an obvious danger. Without specifying on which ground it based its decision, the trial court granted El Capitan's motion for summary judgment. The trial court subsequently entered judgment in favor of El Capitan.

On appeal, Goettsch claims that El Capitan is not entitled to summary judgment on either of the two grounds it raised in its motion. We agree and reverse the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

In April 2003, El Capitan produced its annual Lakeside Rodeo on property it owns in Lakeside. Horses are used in many of the events held at the rodeo. The rodeo grounds include bleachers from which fans can watch the rodeo at a safe distance from the animals.

There is a warm up area on the grounds in which rodeo contestants may warm up their horses. The warm up area is located on a portion of the west end of the rodeo

grounds, adjacent to Vine Street. Fans, children, and vendors are not permitted to enter the warm up area. There is a chain link fence that encloses the rodeo grounds, including the warm up area.

At the time of the 2003 Lakeside Rodeo, Goettsch was working at East County Trucks, which is located on Vine Street, directly across from the west end of the rodeo grounds. On April 26, 2003, Goettsch walked from the East County Trucks' lot to the west end of the rodeo grounds and back approximately three or four times. On his last trip to the rodeo grounds, Goettsch saw a horse standing inside the perimeter fence. The horse was tied to the fence, and was facing west, toward the East County Trucks' lot.

Goettsch stood outside the fence, approximately one to three feet to the left of the horse, to watch the rodeo. Goettsch placed both of his hands on the chain link fence. Several minutes later, the horse pulled back from the fence. As the horse pulled back, Goettsch's hands became entangled in the rope that tied the horse to the fence. The horse's movement caused Goettsch's hands to be pulled against the chain links in the fence. Four of Goettsch's fingers were severed in the incident.

The horse at issue was a "green" horse. A green horse is a horse that has had little education and exposure to activities and events such as horse shows, rodeos, race tracks, or cross-country rides. Green horses are frequently tied to fences or other stationary objects at rodeos in order to expose the horses to the stimuli that are associated with the rodeo. Tying a horse to a chain link fence is a common practice at rodeos.

El Capitan prohibits tying horses to the perimeter fence of the Lakeside Rodeo. Signs that say, "Do Not Tie Horses to the Fence" are posted along the perimeter of the fence. El Capitan did not enforce this prohibition.

B. *Procedural background*

Goettsch filed a two-count complaint against El Capitan and "Doe defendants, horse owner and/or Horse handler."¹ In a cause of action for general negligence, Goettsch claimed that El Capitan owed him various duties, including a duty to inspect the premises for dangerous conditions, to warn of any dangerous condition, and to maintain the premises free from any dangerous condition. Goettsch further claimed that El Capitan had breached its duties and that this breach had caused Goettsch's injury. Goettsch also brought a cause of action for premises liability, in which he incorporated the allegations of his negligence claim.

El Capitan filed an answer in which it denied each allegation in Goettsch's complaint and raised various affirmative defenses, including that Goettsch had "assumed all . . . risks of harm."

El Capitan filed a motion for summary judgment, or in the alternative, summary adjudication. In its memorandum in support of its motion, El Capitan argued that Goettsch's claims were barred by the doctrine of primary assumption of risk. Specifically, El Capitan maintained that because horses are fundamental to the sport of rodeo and because it is well established that horses can be dangerous to humans, by

¹ The causes of action against the Doe defendants are not relevant to this appeal.

watching the rodeo, Goettsch assumed the risk of being injured by a horse. El Capitan also claimed that Goettsch would not be able to establish the threshold element of duty as to either of his claims because the horse presented an obvious danger.

Goettsch filed an opposition to El Capitan's motion in which he contended that his claims were not barred by the doctrine of primary assumption of risk. Among other arguments, Goettsch noted that while the doctrine of primary assumption of risk precludes claims premised on risks that are inherent in the particular activity at issue, tying an unattended horse to a fence is not fundamental to the sport of rodeo.

With respect to El Capitan's claim that the doctrine of obvious danger barred Goettsch's claims, Goettsch argued that the doctrine is a form of secondary assumption of risk, and that it does not provide a complete defense to a plaintiff's cause of action. Goettsch also maintained that the presence of a horse tied to a perimeter chain link fence did not constitute an obvious danger to persons standing on the opposite side of the fence from the horse. Goettsch contended that a reasonable person would believe that a horse that was tied to the outside perimeter fence of the rodeo would be docile and friendly, rather than prone to fright, panic and unpredictable behavior.

After further briefing and a hearing, the trial court entered an order granting El Capitan's motion for summary judgment. In its order, the court stated in relevant part:

"After considerable research and a review of the pleadings, the court's tentative ruling now becomes the order of the court as reflected below. **COURT'S RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION:** Defendant El

Capitan Stadium Association, Inc.'s motion for summary judgment is GRANTED."²

The trial court subsequently entered a judgment in favor of El Capitan. Goettsch timely appeals.

III.

DISCUSSION

The trial court erred in granting El Capitan's motion for summary judgment

Goettsch claims that the trial court erred in granting El Capitan's motion for summary judgment. Goettsch argues that neither of the two grounds on which El Capitan based its motion entitled El Capitan to summary judgment.

A. *Standard of review*

A moving party is entitled to summary judgment when he establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant may make this showing by establishing that the plaintiff cannot establish one or more elements of his cause of action, or that the defendant has a complete defense to the cause of action. (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 466.)

On appeal, the reviewing court makes " 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. [Citations.]" (*Trop v. Sony Pictures*

² Neither the appellate record nor the trial court file contain any written tentative ruling.

Entertainment Inc. (2005) 129 Cal.App.4th 1133, 1143, quoting *Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222-223.)

B. *El Capitan is not entitled to summary judgment on the ground that the doctrine of primary assumption of risk bars Goettsch's claims*

Goettsch claims that the El Capitan is not entitled to summary judgment based on the doctrine of primary assumption of risk.

1. *Governing Law*

a. *Knight v. Jewett*

In the seminal case concerning the doctrine of assumption of risk, *Knight v. Jewett* (1992) 3 Cal.4th 296, 300 (*Knight*), the California Supreme Court considered "the proper application of the 'assumption of risk' doctrine in light of th[at] court's adoption of comparative fault principles" (*Ibid.*)³ In doing so, the court distinguished between cases that involve "primary assumption of risk," and those that involve "secondary assumption of risk." (*Id.* at p. 308.)

"In cases involving 'primary assumption of risk' — where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury — the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving 'secondary assumption of risk' — where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty — the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from

³ Although "[o]nly three justices signed the plurality opinion in *Knight*," the California Supreme Court has subsequently "unanimously restated the basic principles of *Knight*'s lead opinion as the controlling law." (*Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1067.)

the injury, may consider the relative responsibility of the parties."
(*Id.* at pp. 314-315.)

In determining whether the doctrine of primary assumption of risk applies, the *Knight* court stated that the "question of the existence and scope of a defendant's duty of care is a *legal* question . . . and is an issue to be decided by the court, rather than the jury." (*Knight, supra*, 3 Cal.4th at p. 313.)

The *Knight* court discussed primary assumption of risk in the "sports context." (*Knight, supra*, 3 Cal.4th at p. 317.) The court began its analysis by noting that the doctrine of primary assumption of risk is a limitation on the scope of the duty to use due care to avoid causing injury to others:

"As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. [Citation.] Thus, for example, a property owner ordinarily is required to use due care to eliminate dangerous conditions on his or her property. [Citation.] In the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. Thus, although moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them. [Citation.] In this respect, the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant.

"Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly

is not a risk (inherent in the sport) that is assumed by a participant. [Citation.]" (*Id.* at pp. 315-316.)

"The overriding consideration in the application of primary assumption of risk is to avoid imposing a duty which might chill vigorous participation in the implicated activity and thereby alter its fundamental nature." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 253, citing *Knight, supra*, 3 Cal.4th at pp. 318-319.)

In addition to the nature of the sport, the *Knight* court stated that "the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport." (*Knight, supra*, 3 Cal.4th at p. 317 [noting that prior cases had examined the duty of an owner of a sports facility "by reference to the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport"].) "In the sport of baseball, for example, although the batter would not have a duty to avoid carelessly throwing the bat after getting a hit — vigorous deployment of a bat in the course of a game being an integral part of the sport — a stadium owner, because of his or her different relationship to the sport, may have a duty to take reasonable measures to protect spectators from carelessly thrown bats. For the stadium owner, reasonable steps may minimize the risk without altering the nature of the sport." (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1004, citing *Knight, supra*, 3 Cal.4th at p. 317.)

b. *The duties of owners and operators of sports facilities*

Numerous courts have applied *Knight, supra*, 3 Cal.4th 296, in considering the duties owners and operators of sports facilities owe to their patrons. For example, in

Harrold v. Rolling J Ranch (1993) 19 Cal.App.4th 578 (*Harrold*), the court summarized the general duty owners and operators of such facilities owe their patrons:

"The general principle which may be extracted from this discussion in [*Knight*] is that commercial operators of sports and recreational facilities owe a duty of care to their patrons. In general terms, that duty is to ensure the facilities and related services which are provided do not increase the risk of injury above the level *inherent* in the sport or recreational activity itself. A commercial operator violates this duty if, for instance, it sells or rents its patrons defective equipment which aggravates the patrons' risk of injury." (*Id.* at pp. 586-587.)

In analyzing the duty of care owed by a purveyor of horses and guides for trail riding, the *Harrold* court stated:

"There is no doubt horseback riding, even the rather tame sport of riding on the back of walking horses in an afternoon trail ride, carries some inherent risk of injury. A horse can stumble or rear or suddenly break into a gallop, any of which may throw the rider. But this does not necessarily mean the commercial operator of the horse-riding facility owes no duty of care to those who rent its horses and can never be liable for injuries suffered because a horse stumbles, rears, or suddenly breaks into a gallop. The commercial operator has a duty to supply horses which are not unduly dangerous. Furthermore, the operator owes the duty to warn the patrons renting a given horse if that horse has evidenced a predisposition to behave in ways which add to the ordinary risk of horse riding." (*Harrold, supra*, 19 Cal.App.4th at p. 587, fn. omitted.)

In further defining the duty of such providers of horse-riding facilities, the *Harrold* court stated:

"Likewise, a whole host of duties can be ascribed to commercial providers of horse-riding facilities, i.e., not to provide faulty saddles, bridles and other equipment, not to provide dangerous trails, not to provide horses that are shodded poorly — and the list can go on and on. However, in this case we stop short of imposing a duty on stable owners to provide 'ideal' riding horses such that they never buck, bite, break into a trot, stumble or 'spook' when confronted by a

frightening event on the trail such as a shadow or snake or react to peculiar movements of a rider such as excessive spurring or waving of a coat as in this case. We view sudden movements of a horse just as inherent in horseback riding as the presence of moguls on a ski slope are to skiers." (*Harrold, supra*, 19 Cal.App.4th at p. 588.)

A number of other courts have held, pursuant to *Knight, supra*, 3 Cal.4th 296, that owners and operators of sports facilities owe a duty of care to their patrons not to design or operate facilities in a manner that increases the risk of harm to patrons beyond that inherent in the sport. For example, in *Giardino v. Brown* (2002) 98 Cal.App.4th 820, 834 (*Giardino*), the court held that a provider of horses to a children's camp had "a duty at least not knowingly or without due care to provide horses inappropriate for beginning riders. . . ." The *Giardino* court reversed a grant of summary judgment in favor of the provider of a horse in an action brought on behalf of a camper whose fingers had been severely injured while she attempted to tie the horse to a post. (*Id.* at p. 823-824.) Applying *Knight*, the *Giardino* court held "assumption of the risk does not bar plaintiff's lawsuit against [the provider of the horse]." (*Giardino, supra*, 98 Cal. App.4th at p. 834.) (See also *Saffro v. Elite Racing, Inc.* (2002) 98 Cal.App.4th 173, 175 [reversing grant of summary judgment in favor of marathon organizer where runner suffered seizure after race and concluding organizer had duty to provide sufficient water and electrolyte replacement drinks]; *Van Dyke v. S.K.I. Ltd.* (1998) 67 Cal.App.4th 1310, 1317 [reversing grant of summary judgment in favor of ski resort owner where skier was injured in collision with sign placed on ski run and noting, "when a ski area puts signs in a ski run . . . it has a duty to mark the signs so they are plainly visible from all angles to skiers who are skiing on the run"]; *Branco v. Kearny Moto Park, Inc.* (1995) 37

Cal.App.4th 184, 193 (*Branco*) [reversing grant of summary judgment in favor of bicycle motocross operator where rider was injured on bicycle jump and concluding, "a duty is owed to a bicycle racer injured on a bicycle jump which by its design creates an extreme risk of injury"]; *Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, 134 (*Morgan*) [reversing grant of summary judgment in favor of golf course operator where golfer was struck by errant golf ball and stating, "the owner of a golf course has an obligation to design a golf course to minimize the risk that players will be hit by golf balls, e.g., by the way the various tees, fairways and greens are aligned or separated"].)

c. The duty owners and operators of sports facilities owe to spectators

Courts have also applied *Knight, supra*, 3 Cal.4th 296, in considering the duty owed by an owner or operator of a sports facility to spectators. (See, e.g., *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 114 (*Lowe*); accord *Harrold, supra*, 19 Cal.App.4th at p. 588 ["Nor does the inherent danger which goes along with participating in or watching other sports mean the commercial operators of facilities offering these activities owe no duty of care toward . . . spectators. [Citation]; . . . *Rosenberger v. Central Louisiana Dist. Livestock Show, Inc.* (La. 1975) 312 So.2d 300 [rodeo arena owes duty to spectators regarding operation and maintenance of arena]"].)

In *Lowe, supra*, 56 Cal.App.4th at page 114, the plaintiff was struck by a foul ball during a baseball game after having been momentarily distracted from the field of play by the mascot of the defendant baseball team. The mascot, a "caricature of a dinosaur, standing seven feet tall with a tail [that] protrudes out from the costume," was standing

behind the plaintiff, "performing his antics in the stands." (*Ibid.*) In performing those antics, the mascot touched the plaintiff with his tail. (*Ibid.*) Plaintiff turned around toward the mascot, and, as he returned his attention to the field of play, was struck by a foul ball. (*Ibid.*)

The *Lowe* court considered whether the trial court had erred in granting the defendant's motion for summary judgment on the ground that primary assumption of risk barred the plaintiff's claim. (*Lowe, supra*, 56 Cal.App.4th at p. 114.)

"As prescribed by *Knight*, the burden to be surmounted by such filings was to show that any risk to spectators caused by the antics of the mascot did not operate to increase those inherent risks to which spectators at baseball games are unavoidably exposed. In other words, the key inquiry here is whether the risk which led to plaintiff's injury involved some feature or aspect of the game which is inevitable or unavoidable in the actual playing of the game. In the first instance, foul balls hit into the spectators' area clearly create a risk of injury. If such foul balls were to be eliminated, it would be impossible to play the game. Thus, foul balls represent an inherent risk to spectators attending baseball games. Under *Knight*, such risk is assumed. Can the same thing be said about the antics of the mascot? We think not. Actually, the declaration of Mark Monninger, the person who dressed up as Tremor [the mascot], recounted that there were occasional games played when he was not there. In view of this testimony, as a matter of law, we hold that the antics of the mascot are not an essential or integral part of the playing of a baseball game. In short, the game can be played in the absence of such antics. Moreover, whether such antics increased the inherent risk to plaintiff is an issue of fact to be resolved at trial." (*Lowe, supra*, at p. 123.)

2. *Application*

We agree with El Capitan's assertion that it is " 'common knowledge that all horses . . . are liable to be frightened by any unaccustomed . . . appearances and noises in unaccustomed situations. . . . ' " (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456,

468, quoting *Simonds v. Maine Telephone & Telegraph Co.* (1908) 104 Me. 440; see, e.g., *Harrold, supra*, 19 Cal.App.4th at p. 588 [stating that an inherent part of horseback riding is the possibility that a horse will make a sudden movement].) We also assume for purposes of this decision that El Capitan is correct in arguing that the defense of primary assumption of risk applies to the sport of rodeo. (See *Domenghini v. Evans* (1998) 61 Cal.App.4th 118, 122 [concluding "old-fashioned cattle roundup using horsemen and ropes," was a sport subject to the *Knight* primary assumption of risk doctrine].) We further assume that El Capitan is correct in arguing that Goettsch was a spectator of the rodeo for purposes of determining the applicability of the primary assumption of risk doctrine discussed in *Knight, supra*, 3 Cal.4th 296.⁴

In applying *Knight*'s two-prong analysis, we consider first the nature of the sport of rodeo. In support of its motion for summary judgment, El Capitan submitted the following undisputed facts. The Lakeside Rodeo involves bareback riding, barrel racing, bull riding, calf roping, saddleback riding, steer wrestling, and team roping. With the exception of bull riding, horses are used in all of these events. Green horses are often tied to fences or other stationary objects at rodeos in order to expose the horses to stimuli associated with the event. This exposure is a normal and necessary part of any horse's training, to ensure that the horse does not become nervous, excited, spooked, shy or frightened while at the rodeo.⁵

⁴ Goettsch admitted during his deposition that he was watching the rodeo at the time of the accident and agreed with defense counsel that he was a "spectator."

El Capitan presented no evidence that indicates that tying unattended horses to a chain link fence is fundamental to the sport of rodeo, or that allowing horses to be tied to a chain link fence is a "condition[] or conduct that . . . [is] an integral part of the sport itself," relieving El Capitan of its duty as "a property owner . . . to use due care to eliminate dangerous conditions on his or her property." (*Knight, supra*, 3 Cal.4th at p. 315.) Nor did El Capitan present evidence that "vigorous participation in [rodeos] likely would be chilled" (*id.* at p. 318), if tying horses to a chain link fence were restricted. In fact, it is undisputed that tying horses to the chain link fence at issue in this case was *prohibited* by El Capitan and that El Capitan had posted signs along the inside of the fence that say, "Do Not Tie Horses to the Fence."

El Capitan argues that "[t]he relevant risk of harm is the presence and use of horses at rodeos, not the act of tying horses to fences." We disagree. The inherent risk of harm associated with the performance of a sport does not insulate the provider of facilities for the sport from any potential liability associated with the performance of that sport. (See, e.g., *Giardino, supra*, 98 Cal.App.4th at p. 835 ["If it can be shown that [provider of horses to children's camp] increased the risk of harm to plaintiff above that normally associated with learning to ride horses at a Girl Scout camp, by either providing a horse inappropriate to the skill level of the novice riders or failing to warn of the horse's unusual and unsafe disposition, the doctrine of assumption of the risk does not apply];

⁵ Goettsch did not dispute these facts, other than to assert that El Capitan prohibited tying horses to the chain link fence at issue in this case, but did not enforce this prohibition.

Branco, supra, 37 Cal.App.4th at p. 193 [while "jumps, and falls, are inherent to the sport" of bicycle motocross, the sport does "not inherently require jumps which are designed in such a way as to create an extreme risk of injury"]; *Morgan, supra*, 34 Cal.App.4th at p. 132-133 [rejecting argument that golf course owner has no duty to provide reasonably safe golf course because being struck by an errant ball is an inherent risk in the sport of golf]; *Harrold, supra*, 19 Cal.App.4th at p. 587 [commercial horseback operator "has a duty to supply horses which are not unduly dangerous"].)

El Capitan is the owner of property where the sport of rodeo is conducted. As El Capitan notes in its statement of undisputed facts, horses are used in many rodeo events and horses are "large, strong, and unpredictable animals." Thus, rodeo owners must take reasonable measures, that do not alter the nature of the sport, to protect spectators from injuries caused by horses. (*Knight, supra*, 3 Cal.4th at p. 317.) A rodeo owner has a "duty is to ensure the facilities and related services which are provided do not increase the risk of injury above the level *inherent* in the sport or recreational activity itself." (*Harrold, supra*, 19 Cal.App.4th at p. 586.)

We reject El Capitan's argument that it established as a matter of law that it has satisfied that duty merely by providing seating located away from the chain link fence. In support of this argument, El Capitan cites cases in which courts have concluded that a baseball stadium owner satisfies its duty to protect fans from the dangers of foul balls by providing a reasonable number of screened seats. (See *Quinn v. Recreation Park Ass'n* (1935) 3 Cal.2d 725, 728-729; *Neinstein v. Los Angeles Dodgers, Inc.* (1986) 185 Cal.App.3d 176, 181.) The baseball analogy fails for at least two reasons. First, while it

is "common knowledge" (*id.* at p. 184), that foul balls pose a danger to the unscreened baseball fan, El Capitan has presented no evidence suggesting that it is common knowledge that horses tied to a chain link fence pose a danger to persons on the opposite side of the fence. (See part III.C., *post.*) Further, foul balls in baseball are a fundamental part of the game, and protecting all fans from the possibility of being struck by such a ball would require a fundamental alteration to the sport. In contrast, as noted above, tying horses to a chain link fence is not a fundamental part of a rodeo, and altering that practice would not fundamentally alter the sport.

We conclude that El Capitan is not entitled to summary judgment on the ground that the doctrine of primary assumption of risk bars Goettsch's claims.

C. *El Capitan is not entitled to summary judgment on the ground that a horse tied to a chain link fence constitutes an obvious danger*

Goettsch claims that El Capitan is not entitled to summary judgment under the obvious danger doctrine, which provides an exception to the duty of care a landowner owes to persons coming on to his or her land, for dangers that are obvious.

In *Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393

(*Krongos*) the Court of Appeal outlined the obvious danger exception:

"Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. [Citation.] However, this is not true in all cases. '[I]t is foreseeable that even an obvious danger may cause injury, if the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the

defendant and consequences to the community of imposing a duty to remedy such danger [citation] may lead to the *legal* conclusion that the defendant' owed a duty of due care to the person injured. [Citation.]"

Krongos, supra, 7 Cal.App.4th 387, was decided prior to the California Supreme Court's reformulation of the assumption of risk doctrine in *Knight, supra*, 3 Cal.4th 296. In *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658 (*Donohue*), the court considered the effect of *Knight* on the obvious danger defense. Specifically, the court considered whether the obvious danger defense continues to function as an absolute bar to a plaintiff's recovery, akin to the primary assumption of risk doctrine, or whether it is merged into the doctrine of comparative negligence as a form of secondary assumption of risk. (*Id.* at p. 664.) The *Donohue* court concluded:

"[T]he 'obvious danger' exception to a landowner's ordinary duty of care is in reality a recharacterization of the former *assumption of the risk* doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury even if the defendant was negligent. [Citation.] . . . [T]his type of assumption of the risk has now been merged into comparative negligence." (*Id.* at p. 665.)

In *Morgan, supra*, 34 Cal.App.4th at page 135, footnote 3, this court considered a defendant golf course owner's claim that it had no duty to protect a plaintiff from the risk of being hit by a golf ball, "because the risk of being hit by a golf ball is obvious. . . ." The *Morgan* court rejected this claim, reasoning, "Under *Knight*, the obviousness of a risk may . . . support a duty to provide protection, e.g., as in the case of a baseball stadium where the stadium operator may be obligated to provide protection for spectators

in an area where the danger and risk of being hit by a thrown bat or errant ball is particularly obvious." (*Morgan, supra*, 34 Cal.App.4th at p. 135, fn. 3.)

No case of which we are aware has rejected the *Donohue* court's conclusion that the obvious danger doctrine is a form of " 'secondary' assumption of the risk . . . as defined in *Knight*." (*Donohue, supra*, 16 Cal.App.4th at p. 666.) However, other post-*Knight* cases have cited *Krongos, supra*, 7 Cal.App.4th 387, for the proposition that, where an obvious danger exists, generally a landowner has "no further duty to remedy or warn of the condition." (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 673, quoting *Krongos, supra*, at p. 393; see also *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 461.) In the absence of a duty, there is ordinarily no basis for comparative liability. (See *Knight, supra*, 3 Cal.4th at p. 310 ["when the defendant has not breached a legal duty of care to the plaintiff, the defendant has not committed any conduct which would warrant the imposition of any liability whatsoever, and thus there is no occasion at all for invoking comparative fault principles"].)

In this case, even assuming, contrary to *Donohue, supra*, 16 Cal.App.4th 658, that in the wake of *Knight, supra*, 3 Cal.4th 296, a defendant is still entitled to summary judgment if he presents evidence demonstrating as a matter of law that the plaintiff was injured by "a danger . . . so obvious that a person could reasonably be expected to see it," (*Krongos, supra*, 7 Cal.App.4th at p. 393), El Capitan failed to present such evidence in this case. The only evidence El Capitan presented in moving for summary judgment as to the obviousness of the danger was that "horses are large and powerful animals, capable of causing serious injury to people who come into contact with them." The fact that horses

may be capable of inflicting serious injury does not establish as a matter of law that a horse tied to one side of a chain link fence presents an obvious danger to a person who is standing on the other side of the fence. A person could reasonably believe that the fence would protect him from any danger. (See *Talizin v. Oak Creek Riding Club* (1959) 176 Cal.App.2d 429, 436-437 (*Talizin*) [concluding trial court's rejection of assumption of risk defense was supported by the evidence in case where horse jumped over gate at horse jumping competition and injured spectator, because spectator could have "thought himself protected by the gate"].)⁶

Accordingly, El Capitan is not entitled to summary judgment on the ground that a horse tied to a chain link fence constitutes an obvious danger.

⁶ *Talizin, supra*, 176 Cal.App.2d 429, was decided prior to the Supreme Court's reformulation of the assumption of the risk doctrine in *Knight, supra*, 3 Cal.4th 296. Thus, we do not rely on *Talizin* in considering El Capitan primary assumption of risk defense, although it is fully consistent with our decision.

IV.
DISPOSITION

The judgment is reversed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.